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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

WAYMO LLC,

Plaintiff,

vs.

UBER TECHNOLOGIES, INC.; OTTOMOTTO LLC; OTTO TRUCKING LLC,

Defendants.

CASE NO. 3:17-cv-00939

WAYMO LLC'S RESPONSE TO UBER'S MOTION TO MODIFY THE PROTECTIVE ORDER (DKT. 2726)

Hearing:

Date: December 10, 2020
Time: 8:00 AM
Place: Courtroom 12, 19th Floor

Judge: Honorable William Alsup

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I. INTRODUCTION

Uber Technologies, Inc.'s ("Uber") motion stems from a desire to use confidential information produced by parties and non-parties in one litigation (this case, *Waymo v. Uber*) in another litigation (a bankruptcy case, *Levandowski v. Uber*, referred to as the "Adversary Proceeding"). Uber seeks to modify the protective order to allow this without providing any notice to third parties that produced confidential information in this proceeding, and despite Waymo's objections to the overbroad scope of this request.

Uber previously raised its request to use the entire *Waymo v. Uber* record in the Adversary Proceeding. In October 2020, Uber moved the bankruptcy court overseeing the Adversary Proceeding to "compel Waymo to consent to Uber's review and use in this action of the entire record from [*Waymo v. Uber*]." Dkt. 2726-7 at 2-3. Waymo explained that this request was overbroad and inconsistent with this Court's protective order. The bankruptcy court agreed:

> This court has two simple rules for discovery: Don't be greedy and don't be stingy. This means that parties seeking discovery should request only relevant, non-privileged information and that parties who possess relevant, nonprivileged information should cough it up. Uber's request runs afoul of the first of these general rules.
>
> Uber concedes that the Protective Order prohibits the relief it seeks. Uber does not, however, offer any authority that might permit this court to modify another court's order. This court is not aware of such authority. The court views Uber's request as one more properly presented to the judge who entered the Protective Order.
>
> And as Waymo, Google, and Mr. Levandowski point out, the entire record of the Waymo Litigation cannot possibly be relevant to this action. They concede to some overlap of legal and factual issues, but they also credibly point to issues that are not common to both cases. In order to be entitled to discovery, Uber must prove the relevance of the material it requests. It has made no such showing here.

Dkt. 2726-7 at 4-5.

Uber now asks this Court for two forms of relief: (1) a ruling that all of the parties in the Adversary Proceeding—Uber, Levandowski and intervenor Google LLC—be allowed to review the entire record in this case, subject to its confidentiality designations and (2) a ruling granting Uber carte blanche to use the full record from this case in the Adversary Proceeding, without regard to whether or not these materials are relevant to that proceeding. Waymo has consistently told Uber it is interested in practical solutions, not unnecessary discovery costs. Thus, Waymo

does not oppose the first request, provided relevant third parties are notified. However, it does oppose the second, consistent with the bankruptcy judge's ruling.

Specifically, because the entire record from this case is not relevant to the Adversary Proceeding, Waymo does not agree that Uber should be able to ***use*** (i.e., produce) all the materials from this case. Waymo thus requests that its objections, including its relevance objections, be preserved. If the parties to the Adversary Proceeding later dispute the relevancy of a specific document or set of documents that they want to use from this case, they can raise that before the bankruptcy judge. This approach provides a practical path forward, while preserving Waymo's objections to Uber's overbroad discovery demands.

II. FACTUAL BACKGROUND

In February 2017, Waymo filed this action, alleging patent infringement and trade secret misappropriation by Ottomotto LLC ("Otto") and Uber. Dkt. 1. The parties engaged in discovery through the end of 2017. The case settled after four days of trial in February 2018. As part of the settlement, an independent expert evaluated Waymo's claims of trade secret misappropriation related to certain software.

As this Court is aware, the parties in this case took a massive amount of discovery. There were approximately 205 deposition transcripts, 30 third party subpoenas, and 18 testifying experts who served one or more expert reports. Decl. ¶ 4. Waymo itself produced over 145,000 pages of documents, including documents protected by non-disclosure agreements ("NDAs") between Waymo and third parties. Decl. ¶ 5. Waymo provided 50 notices to third parties under those NDAs. *Id.* When produced, these documents were designated by Waymo under the protective order, but include third party confidential information. Decl. ¶ 6.

This voluminous discovery was provided in accordance with the Northern District of California Patent Local Rule 2-2 Interim Protective Order.[1] That order provides that a "Receiving

[1] On March 16, 2017, the Court ordered that the "the Patent Local Rule 2-2 Interim Model Protective Order will apply in this case, effective immediately." Dkt. 60. The parties never agreed on a customized or different protective order, and thus it still applies to this case. Therefore, when quoting the operative protective order, Waymo quotes the Patent Local Rule 2-2 Interim Model Protective Order.

Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this case ***only*** for prosecuting, defending, or attempting to settle this litigation." Patent Local Rule 2-2 Interim Protective Order, ¶ 7.1 (emphasis added). The protective order also explains what to do if Protected Material is subpoenaed or ordered to be disclosed in other litigation. The party receiving the subpoena or subject to the order must promptly notify the designating party in writing, and notify the party causing the subpoena or order to issue that the material covered by the subpoena is subject to the protective order. Patent Local Rule 2-2 Interim Protective Order, ¶ 10.

A. Levandowski's Bankruptcy

Separate from and before this trade secret case, in October 2016, Google initiated an arbitration against Anthony Levandowski for breaching his contractual and legal duties not to compete against Google or solicit its employees when he formed a competing company, staffed it with Google engineers and then sold the company to Uber in 2016. As part of Levandowski's deal with Uber, Uber had entered into an Indemnity Agreement with him in April 2016, agreeing to indemnify him if his former employer, Google, sued him. The arbitration was not about trade secret theft.

In December 2019, the arbitral panel unanimously found Levandowski liable for these breaches, and awarded Google about $179 million in damages. On March 4, 2020—the same day this award was converted to a state court judgment—Levandowski filed bankruptcy. He filed bankruptcy specifically to "stay Google's collection of the Judgment while his and Uber's respective rights under the Indemnification Agreement can be determined." *In re Levandowski*, No. 20-30242 (Bankr. N.D. Cal.), Dkt. 64 at 2.

B. The Adversary Proceeding and Uber's Overbroad Subpoenas to Waymo

On July 16, 2020, Anthony Levandowski filed the Adversary Proceeding in bankruptcy court against Uber, seeking, *inter alia*, to enforce the April 2016 Indemnification Agreement and have Uber indemnify him for Google's $179 million judgment against him resulting from the

arbitration brought by Google. *Levandowski v. Uber Technologies, Inc.*, Dkt. 1, Case No. 3:20-ap-03050 (Bankr. N.D. Cal.). On August 31, 2010, Uber answered and counterclaimed, seeking to avoid any indemnity obligations to Levandowski for the arbitration award. Adversary Proceeding, Dkt. 34. Two of Uber's primary arguments to avoid its indemnity obligations are (1) that Levandowski did not truthfully respond to questions posed during the due diligence investigation conducted by Stroz Friedberg LLC ("Stroz") relating to the acquisition of Otto by Uber;[2] and (2) that Levandowski misappropriated Google's trade secrets after April 2016 while working for Otto or Uber. *Id.* at 77. Google moved to intervene in the Adversary Proceeding, and was permitted to do so for the count in Levandowski's complaint seeking a declaratory judgment that Uber cannot rescind its Indemnification Agreement. Adversary Proceeding, Dkt. 35.

On September 8, 2020, Uber's counsel in the Adversary Proceeding contacted counsel for Waymo in this case, seeking to use material designated under this Court's protective order in the Adversary Proceeding. Declaration of Jordan R. Jaffe ("Decl."), Ex. 1.[3] Uber suggested stipulating to modify this Court's protective order to allow this. *Id.* In response, Waymo explained its view that this Court's protective order did not allow that type of stipulation without notifying third parties. Moreover, Waymo disputed that the entire litigation record was relevant to the Adversary Proceeding. As a compromise, Waymo suggested that Uber issue targeted subpoenas in the Adversary Proceeding for relevant Waymo-only information, which Waymo could then quickly consent to produce under the terms of the Bankruptcy Court's protective order because responsive documents would not implicate third party confidential information.[4] Decl. ¶ 8. Uber signaled possible agreement to this approach, though it reserved the right to issue a subpoena for the whole record. Decl. ¶ 9.

Uber then served Waymo with two subpoenas for production of documents. Exs. 2, 3.

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[2] *See* Dkt. 566 at 4 (describing Stroz investigation).

[3] All further exhibit citations are to the Jaffe declaration.

[4] This approach would have avoided the "odd predicament" that Uber claims it is now in. For example, Uber could have issued a targeted subpoena for the deposition transcripts of former Google or Waymo employees who then joined Uber, which Waymo could have promptly produced once it confirmed their transcripts contain no third party confidential information.

Rather than provide targeted subpoenas, however, Uber issued overbroad ones, requesting all documents from this litigation designated as confidential by Waymo and third parties. It requested: "All Documents, in their complete and un-redacted form, from or related to the Waymo Litigation that were produced by Waymo or designated with some level of confidentiality by Waymo only…." Ex. 2 at RFP No. 1. It also requested "any and all materials preceding or relating to" an independent software expert report created post-settlement. *Id.* at RFP No. 2.

Uber's second subpoena sought "All Documents . . . from or related to the Waymo Litigation that were ***produced by non-parties or third parties*** to the Waymo Litigation." Ex. 3 at RFP No. 1 (emphasis added). Because these requests covered third party confidential information, Waymo advised Uber it would be required to first give notice to all affected third parties before producing the materials. *See* Patent Local Rule 2-2 Interim Protective Order, ¶ 10.

C. Waymo's Proposed Compromise to Uber Relating to the Overbroad Subpoenas

After Uber served the subpoenas, Waymo explained that because they are facially overbroad, they clearly request information irrelevant to the Adversary Proceeding. Waymo also explained the third party confidentiality issues. Uber, however, refused to narrow its subpoenas, arguing that it needs access to the full record from this case to search for and identify materials that may be relevant. Since Uber was dead set on reviewing the entire record—including the portions with no relevance at all to Uber's current claims in the Adversary Proceeding—Waymo suggested as a compromise that Uber file a motion before this Court to amend the "use" restriction in the protective order to allow review (not use) of the full record. Waymo stated that, under these specific circumstances, where the documents remain subject to their original confidentiality designations (*e.g.*, AEO) and Uber lawyers previously had access to this material, it would not oppose a motion to permit review of the whole record, subject to seeing the motion itself. Uber agreed to this procedure. On October 3, Uber's counsel confirmed by email that it would "be filing a motion before Judge Alsup, which will seek to modify the 'use' restriction in the Waymo protective order to permit Uber's counsel, [*sic*] to review the record from the Waymo litigation,

including the independent software expert's findings, on an attorney's eyes only basis." Ex. 4.

Four days later, Uber reversed course and instead filed a motion to compel before the Bankruptcy Court. Ex. 5. The parties then briefed the dispute before the bankruptcy judge, the Honorable Hannah L. Blumenstiel. As quoted above, on October 23, 2020, the Court agreed with Waymo in denying the motion to compel the overbroad subpoenas. Dkt. 2726-7. Almost two weeks later, on November 5, 2020, Uber filed its motion to modify the protective order in this Court. Dkt. 2726.

III. ARGUMENT

A. Waymo Does Not Oppose a Limited Modification of the Protective Order

As discussed in more detail below, Uber has failed to show that the entire record in this case is relevant to the Adversary Proceeding. But, Waymo is not interested in creating unnecessary discovery costs. To avoid a dispute, Waymo does not oppose one part of the relief Uber seeks in its motion—that all of "the parties to the Adversary Proceeding" be permitted "to review the record in this case for the limited purpose of determining its relevance to the Adversary Proceeding" (Uber Mot. at 13; see also *id*. at 6, ¶ 14)—provided that this Court's protective order is modified to permit that, the relevant third parties are given notice and the opportunity to object, and relevance objections by Waymo (or any other party) are preserved.[5]

But the parties disagree on what the current protective order requires as to third parties that produced confidential information in this case. Waymo believes that Paragraph 10 of the Protective Order requires notice to third parties who produced confidential information in this case, in order to give them the opportunity to object before their information is disclosed in another case, to different parties. Specifically, Paragraph 10 of the Protective Order requires that "[i]f a Party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action …that Party must: (a) promptly notify in writing the Designating Party…." The Protective Order also provides third parties the opportunity to object and move for a protective order after being notified. *Id.* Uber's motion does

[5] All review should be subject to the current protective order's designations—*e.g.*, an outside Attorneys Eyes Only ("AEO") document would remain AEO, etc.

not provide any notice or the opportunity for third parties to object to their confidential information being used in another proceeding. Waymo believes the correct course is to modify the protective order to allow review of the record for purposes of the Adversary Proceeding, but require Uber to provide notice to any affected third parties. Waymo does not oppose such a modification, provided that Uber, as the requesting party, bears the burden of providing notice.

Uber's cited case law does not support depriving these third parties of notice. None of them address a modification of a protective order without giving notice or an opportunity to object to the non-parties that provided discovery in reliance on that order. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1128, 1137 (9th Cir. 2003) (case did not concern third-party discovery, only certain confidential information of third parties in medical records produced by parties, which the court held can be redacted); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 471 (9th Cir. 1992) (modification permitted as to six deposition transcripts of employees of the defendant where defendant had opportunity to object to modification); *Olympic Refining Co. v. Carter*, 332 F.2d 260, 262 (9th Cir. 1964) (discovery requested did not concern third parties); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428-29 (10th Cir. 1990) (no mention that discovery requested concerns third parties, and in any case, court noted that because defendants—and parties opposing modification of protective order—are parties to the collateral suits, they have both the interest and standing to raise relevancy and privilege objections to the production of any materials in those courts); *Wilk v. Am. Medical Ass'n*, 635 F.2d 1295, 1296 (7th Cir. 1980) (no mention that discovery requested concerned third parties).

Indeed, Uber's statement that the Ninth Circuit in *Beckman* held that "the fact that one or more ***non-parties*** (or even parties) produced information in reliance on the protective order is not enough, on its own, to justify refusing to modify the protective order" is incorrect. Dkt. 2726 at 5 (emphasis added). *Beckman* involved the deposition transcripts of employees of a party.[6] And in any event, the Court in *Beckman* made no such holding as to non-parties.

[6] *Beckman*, 966 F. 2d. at 471 ("Discovery included the depositions of six International employees involved in the development and administration of the EIL policies sold to policy holders around the country. ")

Uber further argues that non-parties may "prefer that the Court not modify the Protective Order" but states their information will remain "fully protected" pursuant to the Adversary Proceeding protective order. Dkt. 2726 at 10. This reasoning is flawed. First, the non-parties' information would no longer be protected by the "use" restriction in this Court's protective order as it existed when they produced information. The current protective order restricts use to this litigation only. Uber's proposed modification would deprive third parties of that protection and permit their confidential information to be disclosed to new parties (*e.g.*, Levandowski), for new purposes, and in a new forum that they likely are not monitoring. Second, Uber's proposal does not provide third parties the protection found in Paragraph 10 of this Court's protective order, which requires that if third party confidential information is required to be disclosed, third parties are given notice and the right to object. Under Uber's proposal, third parties will be given no notice that their information may be disclosed to other parties and used in the Adversary Proceeding.

Accordingly, Waymo does not oppose a limited modification of the protective order to allow Uber and all the parties to the Adversary Proceeding to review the entire litigation record, but it believes the rights of third parties under the existing protective order should be protected.[7]

B. Uber's Request to Use the Entire Litigation Record Is Overbroad

Uber does not request only to review the entire litigation record. It also seeks permission to ***use*** (i.e., produce in discovery) the entire record in the Adversary Proceeding. But the Adversary Proceeding relates to whether Uber has to indemnify Levandowski under the terms of a specific contract between Levandowski and Uber. And Uber has not shown that ***all*** of the materials in this case are relevant to that proceeding. This is exactly what Waymo previously explained in its briefing before Judge Blumenstiel (Ex. 6 at 3-4) and with which the court agreed. Dkt. 2726-7. Uber appears not to have taken Judge Blumenstiel's comments to heart. And Uber offers no justification for why this Court should revisit that ruling. Waymo therefore requests that

[7] Waymo agrees with Uber that to the extent that Uber is granted any rights for purposes of the Adversary Proceeding, all "other parties" to the Adversary Proceeding (*i.e.*, Levandowski and Google) should have the same rights. Uber Mot. at 6, ¶ 14.

this Court's ruling on Uber's motion preserve all relevance and other objections to Uber's use (i.e. production) of material from this record in the Adversary Proceeding.

In its latest motion, Uber largely recycles the relevance arguments it unsuccessfully presented to Judge Blumenstiel. As in that proceeding, none of the arguments establishes that the entire litigation record is relevant to the Adversary Proceeding. To address each in turn:

Overlap in Witnesses: Uber argues that there is overlap in witnesses deposed in this case and the witnesses identified in the parties' Initial Disclosures in the Adversary Proceeding. Dkt. 2726 at 8. That there are some overlapping witnesses does not mean that the full record in this litigation is relevant. Uber does not even identify the subject matter that those witnesses testified about and how it is relevant.

"Core Facts" Alleged Overlap: Uber argues that "core facts" and events in this case are relevant to the Adversary Proceeding. But Uber did not limit its request to just those allegedly overlapping "core facts." For example, Uber argues that whether Levandowski provided accurate and complete information to Stroz, and whether Levandowski possessed or retained access to Waymo confidential information after April 11, 2016, are relevant overlapping issues. Waymo does not dispute that some information related to the Stroz investigation could be relevant to Uber's defenses.[8] Waymo already produced, in response to Uber's subpoena in the Adversary Proceeding, both sides' forensic expert reports after verifying those reports did not include third party confidential information. But this does not establish that the entire record is relevant as this was only one aspect of the litigation.

Moreover, Stroz collected confidential personal information of several former Google employees that went to work at Uber. Uber does not address why the personal information of these employees other than Levandowski is relevant.

"Post-Signing Bad Act" Defense: Uber argues that Levandowski's role in the misappropriation of trade secrets or patent infringement is relevant to its claims or defenses, including as a "Post-Signing Bad Act." Dkt. 2726 at 8. As an initial matter, Uber's current

[8] Waymo understands that Levandowski issued a subpoena to Stroz in the Adversary Proceeding on Nov. 13, 2020, requesting documents that he believes are relevant to his claims.

position—that Levandowski committed or was aware of trade secret misappropriation while employed by Uber or Otto —is quite an about face from the positions it took before this Court. But all these arguments relate to what Levandowski knew or did. And while Levandowski was no doubt a central player in this case, this case was *Waymo v. Uber*, not *Waymo v. Levandowski*. Thus, large swaths of discovery in this case concerned topics unrelated to the Adversary Proceeding even under Uber's theories. This includes, but is not limited to: Waymo's product development, Waymo's business plans and forecasts for its self-driving car technology, Waymo's financial information, Waymo's partnerships and potential partnerships with third parties, the early history of Waymo's self-driving car program, a former Uber employee's whistleblower letter, and the discovery that Uber took of Waymo as a result of that letter. *See, e.g.*, Dkt. 2383. In sum, Uber's arguments fall far short of establishing that the ***entire*** record is relevant to its claims in the Adversary Proceeding.

Finally, in its motion before the Bankruptcy Court, Uber offered to exclude from its request Waymo's source code. Ex. 5 at 4. For whatever reason, it did not similarly agree to carve out that request in its motion before this Court. This is further evidence that the whole record is not relevant or necessary to be produced in the Adversary Proceeding.

To reiterate, Waymo does not oppose allowing Uber, Levandowski, and Google to review the entire record under the terms described above, even though it includes material that is clearly irrelevant to the Adversary Proceeding. This compromise eliminates Uber's concerns with being allegedly unable to figure out what evidence is relevant from the litigation record, as well as prevents Waymo from having to redo discovery in response to further subpoenas from Uber. Waymo just asks that any relevance and other objections be preserved before ***use*** (*i.e.* production) of that material in the Adversary Proceeding. If Uber reviews some set of documents and wants to use them in the Adversary Proceeding, the parties can discuss and hopefully agree to produce those documents. If there is a remaining dispute, the parties can raise it before Judge Blumenstiel as necessary.

C. Uber's Alternative Proposal Is Unworkable

In the alternative, Uber asks for permission to access and use eight vague categories of

documents in the Adversary Proceeding. Dkt. 2726 at 11-12. The request is more akin to a subpoena than a motion to modify the protective order. It is unclear how Uber is asking the Court to modify the protective order to provide access only to those materials, or how those materials will be listed or cabined in a reasonable fashion in a modified protective order. For example, Uber asks for "related materials" from certain expert witnesses.[9] Left unexplained are what comprises "related materials" and how the parties would resolve any disputes about what is a related material or not. This request further does not address the third party confidential information included in these enumerated categories.

The Court need not wade into these issues. To the extent it understands Uber's categories, Waymo does not agree that each document possibly embraced by them would be relevant or properly produced in response to a subpoena. But Waymo does not oppose Uber being permitted to review all these enumerated materials when reviewing the entire record as described previously, including after third party notice issues have been resolved. And any necessary future determination regarding whether specific documents are or are not relevant to the Adversary Proceeding can be appropriately determined by Judge Blumenstiel, the judge presiding over the Adversary Proceeding.

In addition, Uber's requests are emblematic of the improper approach to discovery with Waymo it has taken thus far. One of Uber's requested categories is "The documents and data produced by non-party Stroz Friedberg LLC." Dkt. 2726 at 12. But "Stroz was and is Uber's agent." Dkt. 2128 at 5. If Uber wants evidence from Stroz to support its claims and defenses in the Adversary Proceeding, the appropriate course would have been to request the material from its agent directly. If Stroz was unwilling to produce it voluntarily, Uber should have subpoenaed it from them in the Adversary Proceeding. Uber has apparently made no efforts to get this material from Stroz, instead embroiling Waymo in unnecessary motion practice in two courts.

IV. CONCLUSION

For the foregoing reasons, Waymo does not oppose a limited modification of the

[9] Even though listed in Uber's motion, Waymo already produced in response to Uber's subpoenas expert reports from Andrew Crain and Paul French.

Protective Order to: (1) allow the parties to the Adversary Proceeding to ***review*** confidential information for purposes of the Adversary Proceeding; (2) provided that third parties are appropriately notified; and (3) all relevancy objections are preserved. It opposes Uber's blanket request to ***use*** the entire record over Waymo's objections because the entire record is not relevant to the Adversary Proceeding. Waymo also opposes Uber's alternative approach, which is unworkable in practice and does not address third party notice concerns.

DATED: November 19, 2020

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